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10/750,402

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Paul T. Van Gompel

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KIMBERLY-CLARK WORLDWIDE, INC.
Catherine E. Wolf
401 NORTH LAKE STREET
NEENAH, WI 54956

EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/750,402
Filing Date: December 31, 2003
Appellant(s): VAN GOMPEL ET AL.

David J. Arteman
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 18 October 2007 appealing from the Office action mailed 22 March 2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

Ground 2: In view of the Terminal Disclaimer filed on June 14, 2007 and approved on June 22, 2007, the provisional rejection of claims 34, 38-39, 43-45, and 48-51, under the judicially created doctrine of obvious-type double patenting over claims 1-45 of copending Application No. 10/749,761, is withdrawn by the examiner.

WITHDRAWN REJECTIONS

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The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner. Ground 2: the provisional obvious-type double patenting rejection is withdrawn in view of the Terminal Disclaimer approved by the Office on June 22, 2007.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,193,701	VAN GOMPEL	2-2001
2002/0072726	MISHIMA	6-2002

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 34, 38-39, 43-45 and 48-51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Van Gompel et al (US 6,193,701) in view of Mishima et al (US 2002/0072726 A1).

With respect to claim 34, as seen in Figures 7-8, Van Gompel et al disclose a disposable absorbent garment (figs. 1 and 7) comprising: an elastic (c. 6, l. 52) outer layer (24) having an outer layer perimeter (c. 14, ll. 55-60); an elastic (c. 15, ll. 2-4 and ll. 17-28) inner layer (68) wherein the elastic inner layer (68) has an elastic inner layer perimeter bonded to outer layer perimeter (c. 14, ll. 58-60) with a plurality of adhesive bonds (62) (figs. 1 and 2), or a plurality of thermal bonds (34) (figs. 7, 9 and 12) (c. 15, ll. 51-52); and an absorbent assembly (52)

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positioned between the outer layer (24) and the elastic inner layer (68) (c. 6, ll. 20-25), wherein the absorbent assembly (52) includes a topsheet layer (68), a core layer (70) and a barrier layer (64) (c. 8, ll. 63-65).

Van Gompel discloses the claimed invention except for an elastic inner layer defining an opening located in an internal position to the elastic inner layer perimeter. Mishima, at [0001], suggests an opening in an elastic inner layer so that body waste may be received through the opening of the layer to prevent body waste from sticking to the wearer's skin. As seen in Figure 1, Mishima teaches an elastic inner layer (7) defining an opening (8) located in an internal position to the elastic inner layer perimeter. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the inner layer of Van Gompel defining an opening as taught by Mishima in order to prevent body waste from sticking to the wearer's skin with a reasonable expectation of success.

With respect to claim 38, Van Gompel discloses the claimed invention except for the outer layer is liquid impermeable. Mishima, at [0056], suggests forming an outer layer with high water-resistant property. As seen in Figure 2, Mishima teaches an outer layer (5) that is liquid-impermeable [0025]. Water-resistant outer layers are known in the diaper art to contain body fluids within the diaper. A liquid impermeable outer layer would perform the substantially identical function of containing body fluids within the diaper in the substantially identical manner as the water-resistant outer layer taught by Mishima. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the outer layer of Van Gompel to be water-resistant, i.e. liquid impermeable, as taught by Mishima in order to contain body fluids within the diaper with a reasonable expectation of success.

With respect to claim 39, Van Gompel teaches the outer layer (24) is liquid permeable (c. 7, ll. 59-60).

With respect to claim 43, Van Gompel discloses the claimed invention except for teaching the elastic inner layer is elastic in a longitudinal direction of the garment. Mishima, at [0028] suggest using an elastic inner layer that is elastic in both longitudinal and lateral directions of the garment. As seen in Figure 7, Mishima teaches such an elastic layer (7). Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the elastic inner layer of Van Gompel elastic in a longitudinal direction as taught by Mishima since Mishima states, at [0039], that the advantage to forming the layer with this design is that the layer is pressed more tightly against the wearer's body thereby improving the fit of the layer in the wearer's crotch.

With respect to claim 44, Van Gompel discloses the claimed invention except for the elastic inner layer is liquid impermeable. Mishima, at [0025], suggests the use of a liquid impermeable inner layer. As seen in Figure 7, Mishima teaches a liquid impermeable elastic inner layer. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the elastic inner layer of Van Gompel liquid impermeable as taught by Mishima since Mishima states, at [0053 and at 0064], that the benefit of using liquid impermeable inner layer is that it prevents the body wastes from rewetting the skin facing surface of the layer and sticking to the wearer's skin.

With respect to claim 45, Van Gompel teaches the elastic inner layer includes tow or more layers of materials (c. 10, ll. 19-21).

With respect to claims 48 and 49, as best depicted in Figures 1 and 2, Van Gompel teaches the outer layer (24) length and width is greater than the elastic inner layer (68) length and width because inner layer (68) edges (58, 60, 54, 56) are attached to outer layer (24) by adhesives (62) at locations inboard of the outer layer (24) perimeter.

With respect to claim 50, as best depicted in Figures 7 and 12, Van Gompel teaches the perimeter bonded area (40, 42, 44, 46) has a percentage of bonded area (34) to unbonded area of from 10 to 40 (c. 17, ll. 23-26).

With respect to claim 51, as best depicted in Figure 1, the four corners of the absorbent assembly (52) are attached to the outer cover (24) by adhesive (62). The points of attachment are located at each of four the corners of the absorbent assembly (52) and symmetrically arranged along both the lateral and longitudinal centerlines of the absorbent assembly such that the assembly can be considered attached at points along the lateral centerline and along the longitudinal centerline.

(10) Response to Argument

Appellant argues the following:

I. With respect to independent claim 34:

Claim 34 requires 5 elements; Van Gompel teaches only four out of the five required elements because Van Gompel does not teach an elastic inner layer with an opening as required by claim 34. Mishima does not teach the five elements required because Mishima does not teach an elastic outer layer.

II. To modify the body side liner (68) of Van Gompel would frustrate the purpose of the liner which is to isolate the skin from the core underneath the liner.

III. With respect to claim 39, Appellant argues that Mishima teaches the outer cover is “water-resistant” but one skilled in the art would not make the proposed modification, i.e. making the outer cover of Van Gompel water-resistant because Van Gompel provides a liquid impermeable backsheet and there is no motivation to suggest two liquid impermeable elements are desirable.

IV. Van Gompel does not explicitly disclose the outer layer is liquid permeable, but merely describes permeable materials that may be used to construct the outer layer without a teaching as to whether the materials are permeable or impermeable.

V. With respect to claim 51, Appellant argues that claim 51 requires the absorbent assembly to be attached to the outer layer along a lateral centerline of the absorbent assembly.

These arguments are not persuasive for the following reasons:

I. Under 35 U.S.C. 103(a), the obviousness of an invention cannot be established by combining the teachings of the prior art references absent some teaching, suggestion, incentive, or predictability supporting the combination. This does not mean that the cited prior art references must specifically suggest making the combination.

Rather, the test for obviousness is what the combined teachings of the prior art references would have suggested to those of ordinary skill in the art. This test requires it be taken into account not only the specific teachings of the prior art references, but also any inferences which one skilled in the art would reasonably be expected to draw therefrom. A patent for a

combination, which only unites old elements with no change in their respective functions, obviously withdraws what is already known into the field of its monopoly and diminishes the resources available to skillful men. Where the combination of old elements performed a useful function, but it added nothing to the nature and quality of the subject matter already patented, the patent fails under 35 U.S.C. 103(a). When a patent simply arranges old elements with each performing the same function it had been known to perform and yields no more than one would expect from such an arrangement, the combination is obvious.

Regarding Appellants' first argument, the examiner respectfully disagrees. In the instant case, Van Gompel teaches In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Here, Van Gompel teaches an elastic outer layer and absorbent assembly substantially as claimed; Mishima teaches an elastic inner layer defining an opening. Therefore the prior art includes each element claimed, although not in a single prior art reference; with the only difference between the claimed invention and the prior art being the lack of actual combination of the elements in a single prior art reference.

One of ordinary skill in the art could have combined the elements, (in this instance, an elastic outer layer and an elastic inner layer, as claimed) by known methods of diaper construction and joining the layers using adhesive, thermal, ultrasonic and compression bonding as is known in the art since prior art outer and inner layers are joined to form unitary garments in conventional diapers. In combination, each element (an outer layer, and an inner layer defining

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an opening) would have performed the same function as it does separately and one of ordinary skill in the art would have recognized that an opening would allow body waste to pass through the opening for containment in the absorbent core located between the outer and inner layers.

II. The examiner is not modifying the liner of Van Gompel, the examiner is adding the inner layer defining an opening as taught by Mishima to the garment of Van Gompel, such that the opening defined by the inner layer of Mishima is located adjacent the skin-facing side of the liner of the absorbent assembly of Van Gompel.

III. With respect to the argument that there is no motivation to suggest that two liquid impermeable elements are desirable, the examiner notes that conventional training pants commonly include two liquid impermeable elements: the liquid impermeable outer layer of the training pant, and a liquid impermeable barrier layer associated with an absorbent assembly or insert to solve the problem of body fluid leaking from the insert and the training pant and soiling the wearer's clothing after the garment is subjected to multiple insults of urine.

Therefore the scope and content of the prior art contain all that is claimed wherein the only difference is the lack of actual combination of the elements in a single prior art reference. It would have been obvious to one of ordinary skill in the art at the time the invention was made to form the garment of Van Gompel with the inner layer defining an opening as taught by Mishima, motivated by the expectation of allowing body waste to pass through the opening for containment in the absorbent core.

IV. With respect to the argument that Van Gompel does not explicitly disclose the outer layer is liquid permeable but merely lists materials that may be used to construct the outer layer without a teaching as whether the materials are permeable or impermeable, the examiner notes

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that, by way of example, at c. 7, ll. 59-60, Van Gompel discloses the use of nonwoven, spunbonded polypropylene fabric composed of or formed into a web. Nonwoven spunbonded polypropylene fabric is inherently liquid permeable because fluid can penetrate the voids between the fibers of the nonwoven fabric. Absent some teaching to the contrary, the examiner has reasonable basis that the outer layer of Van Gompel comprised of nonwoven, spunbonded polypropylene fabric composed of or formed into a web is inherently liquid permeable.

V. With respect to claim 51, as best depicted in Figure 1, the four corners of the absorbent assembly (52) are attached to the outer cover (24) by adhesive (62). The points of attachment are located at each of four the corners of the absorbent assembly (52) and symmetrically arranged along both the lateral and longitudinal centerlines of the absorbent assembly such that the assembly can be considered attached at points along the lateral centerline and along the longitudinal centerline.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Ginger Chapman

Conferees:

Tatyana Zalukaeva

/Tatyana Zalukaeva/

Supervisory Patent Examiner, Art Unit 3761

/Nicholas D Lucchesi/

Supervisory Patent Examiner, Art Unit 3763

Nicholas Lucchesi

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